R. A. 586, citing Bitancourt v. Eberlin, 71 Ala. 461; Fleming v. West, 98 Ga. 778, 27 S. E. 157; Bimeler v. Dawson, 5 Ill. 536, 39 Am. Dec. 430; Bickerdike v. Allen, 157 Ill. 95, 29 L. R. A. 782, 41 N. E. 740; Sturgis v. Fay, 16 Ind. 429, 79 Am. Dec. 440; Weaver v. Boggs, 38 Md. 255; Harryman v. Roberts, 52 Md. 65; Continental Nat. Bank v. Thurber, 74 Hun, 632, 26 N. Y. Supp. 956; Northcroft v. Oliver, 74 Tex. 162, 11 S. W. 1121; Hinckley v. Kettle River Co., 70 Minn. 105, 72 N. W. 835. In Knowles v. Logansport Gas Light & C. Co., 86 U. S. 58, 22 L. Ed. 70, it is said: 'We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. When the defendant resides in the state in which the proceedings are had, service at his residence and perhaps other modes of constructive service may be authorized by the laws of the state.' The reason for denying jurisdiction in personam of nonresidents by publication, is founded in international usage. The comity of states forbids one to extend its jurisdiction into another, and no proceeding that attempts to do so is due process of law unless by the consent of the party proceeded against; but the reason for the rule has no application to residents of the state, and hence by the weight of authority the rule itself is not applicable to them."

Thus it will be seen that there can be little doubt of the constitutionality of this statute when applied to domestic corporations, and according to the opinion of the learned author in the article quoted from it is constitutional also as to service by publication on foreign corporations doing business in the state, because our statute allows such service only where there is no agent in the county or corporation wherein the case is commenced, and further requires affidavit of that fact and of the fact that there is no person in said county or corporation on whom there can be service.

But in New River Mineral Co. v. Seeley, 120 Fed. 193, Judge Brawley, citing Staunton Perpetual B. & L. Co. v. Haden, 92 Va. 201, 23 S. E. 285, said: "The decisions of the Supreme Court of Appeals of Virginia clearly establish the proposition that, where constructive service of process is allowed in lieu of personal service, the terms of the statute by which it is authorized must be strictly followed, or the service will be invalid, and the judgment rendered thereon by default be void."

See note to Moyer v. Bucks, 16 L. R. A. 231.

SMITH et al. v. WHITE et al.

Nov. 21, 1907.

[59 S. E. 480.]

1. Appeal—Disqualification of Judge—Sufficiency of Record.—Code 1904, § 3049, provides that if a judge of any circuit or city court shall consider it improper for him to decide any case or preside at any trial pending therein, unless said case is removed as provided by law, the fact shall be entered of record and certified by the clerk to the Governor, who shall designate another judge to act. Held, that a certified statement of the clerk, appended to the transcript of the record filed with the petition for an appeal, that the fact that a judge was

disqualified from sitting was not entered of record by the clerk nor certified to the Governor, did not make it affirmatively appear that the disqualification was not entered of record, since the custodian of documents or records cannot certify that a specific document does not exist in his office or that a particular entry was not made on his records, but he must be sworn and examined as any other witness.

2. Same—Presumptions.—Where the record does not affirmatively show the contrary, it will be presumed that a judge, authorized to sit under certain circumstances in place of a disqualified incumbent of a court of general jurisdiction, acted under proper authority in so sitting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3683.]

3. Wills—Construction—Separate Clauses.—The general rule is that when words of a will, in the first instance, distinctly indicate an intention to make an absolute gift, such gift can only be lessened by subsequent provisions equally clear and decisive, and where there are two apparently inconsistent provisions the court will, if possible, reconcile them, and will not disturb the first provision further than necessary to give effect to the second.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 987-989.]

4. Same.—A will provided: "The residue of my property of every kind I devise to my executor, to be held in trust for the use and benefit of his wife and children, except his two elder sons. The income only of the amount thus devised shall be at the disposal during her life. She may, however, dispose of the whole amount by will to take effect after her death," etc. Held, that the executor's wife and children, other than the two elder sons, were jointly entitled to the income of the property devised during the wife's life, and that on her failure to dispose of the corpus by will it would pass to such children and the heirs of the wife jointly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1452-1455.]

5. Trusts—Sale of Trust Estate—Authority—Leave of Court—Necessity for Obtaining—Confirmation—Statutory Provisions.—Under Code 1904, § 2616, providing that a trustee who thinks that the interests of the beneficiaries will be promoted by a sale of the estate may file a bill in equity to obtain such sale, etc., a court having jurisdiction to order a sale may confirm a sale made by the fiduciary before suit is brought, provided it be clearly shown as required by section 2620, independent of any admissions in the answers, that the interests of the beneficiaries will be promoted, and the court is of opinion that the right of no person will be violated thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 268.]

6. Same—Evidence—Affidavits.—The rule that, in the absence of a statute authorizing it, affidavits are not admissible to establish the facts necessary to enable a court to enter a judgment or decree on the merits, applies to proceedings under Code 1904, § 2616, relating to sales of trust estates, etc., and the fact that a sale by a trustee promoted the interests of the beneficiaries cannot be shown by affidavits in a suit to confirm the sale.

Appeal from Circuit Court, Albemarle County.

Suit by John M. White, trustee, against Mrs. Lucy W. Smith, W. Lawrence Smith, and others. Decree for complainant, and defendants W. Lawrence Smith and others appeal. Reversed.

G. B. Sinclair and *C. W. Allen,* for appellants.
Perkins & Perkins and *White & Long,* for appellees.

BUCHANAN, J. The first error assigned is that the court had no jurisdiction of the case, because the record shows that Judge Christian, of the corporation court of the city of Lynchburg, who entered the decree appealed from, had no authority to sit in the case.

The appellee instituted this suit in the circuit court of Albemarle county, of which he was judge, for the sale of certain real estate which he held in trust, and for the construction of the clause of the will under which he held the trust estate sought to be sold. By section 3049 of the Code of 1904 it is provided, among other things, that "if the judge of any circuit or city court * * * is so situated as to render it improper in his judgment for him to decide any case or proceeding, or to preside at any trial, civil or criminal, pending therein, unless said case or proceeding is removed as provided by law, the fact shall be entered of record by the clerk of said court, and at once certified by him to the Governor, who shall designate a judge of some circuit court or of some city court for a city of the first class to preside at the trial of such cause or hold such term."

Appended to the transcript of the record filed with the petition for an appeal is a certified statement of the clerk of the court, made at the request of appellants' counsel, that the fact that Judge White was disqualified from sitting in the cause was not entered of record by the clerk nor certified by him to the Governor.

This certificate is no part of the record in the case. The question of Judge Christian's right to sit in the cause was not raised in the trial court, and, if it had been, and the certificate in question had been offered in evidence to show that no such entry had been made, it would not have been admissible, if objected to; for by the common-law rule (and that rule has not been

altered by statute in this state) the custodian of document of records has no authority to certify that a specific document does not exist in his office, or that a particular entry was not made on his records. He cannot establish the nonexistence of a particular document or entry by a certificate to that effect, but must be sworn and examined as any other witness. 3 Wigmore on Ev., p. 2109, § 1678; Greer *v.* Fergerson, 104 Ga. 552, 30 S. E. 943, 945, 946.

But it is claimed that the clerk's certificate to the copy of the record accompanying the petition for appeal—that it "is a true and correct transcript and copy of all papers, evidence, certificates, orders, and decrees as appear of record in my office" in the cause—shows that no entry had been made of the fact that Judge White was so situated that it was improper for him to sit in the case.

The entry which the statute required the clerk to make was not an order or decree, in the case, but was a mere statement of fact which he was required to enter of record. It does not, therefore, affirmatively appear from the record that the fact of Judge White's disqualification to sit in the case was not entered of record as required by the statute.

The circuit court of Albemarle county being a court of general jurisdiction, having jurisdiction both of the subject-matter and the parties in this case, and the judge of another circuit or of a city court of the first class being authorized to sit in place of the disqualified incumbent under certain circumstances, it will be presumed that Judge Christian in sitting in the cause acted under proper authority; the contrary not affirmatively appearing from the record. There is some conflict in the authorities upon this point, but the weight of authority and the better reason is in favor of the view here taken. See 23 Cyc. 562, and cases cited in notes 4 and 5; People *v.* Ah Lee Doon, 97 Cal. 171, 31 Pac. 933; Riggs *v.* Owen, 120 Mo. 176, 25 S. W. 356; State *v.* Newman, 49 W. Va. 724, 39 S. E. 655; Littleton *v.* Smith, 119 Ind 230, 21 N. E. 886; Forrer *v.* Coffman, 23 Grat. 871; Galpin *v.* Page, 18 Wall. (U. S.) 350, 21 L. Ed. 959.

The case of Gresham *v.* Ewell, Judge, 85 Va. 1, 6 S. E. 700, is relied on by the appellants as sustaining their contention; but as we understand that case it does not do so. In that case it was conceded that the fact of the disqualified judge's inability to sit in the case was not entered of record as required by the statute, so that it affirmatively appeared in the view of the majority (two judges out of a court of three) that the visiting judge was without authority to enter the judgment complained of; and this was the ground of their decision as we construe it.

One of the objects of this suit was to obtain a construction of the fourteenth clause of the will of Dr. Cabell. That clause is

as follows: "The residue of my property of every kind I devise to my executor, to be held in trust for the use and benefit of his wife and children, except his two elder sons. The income only of the amount thus devised shall be at the disposal during her life. She may, however, dispose of the whole amount by will to take effect after her death, in the arrangement of which I desire her to take the advice of her husband."

If the testator had stopped at the end of the first sentence of that clause, and it constituted all that related to the gift, it could not be doubted that under the decision of Fitzpatrick *v.* Fitzpatrick, 100 Va. 552, 42 S. E. 306, 93 Am. St. Rep. 976, and the authorities there cited, that the wife and children, except the two elder sons, would take a joint fee-simple estate in equity in the property devised. In the case of Fitzpatrick *v.* Fitzpatrick the gift was to the wife and children, whilst in this the gift is to the executor to be held in trust for the benefit of his wife and children. But the mere fact that the property is to be held in trust does not change the rights of the donees, except to make it an equitable instead of a legal estate. That it was the intention of the testator that the children should take an interest in the gift, as well as the mother, is emphasized by the exclusion of the executor's two elder sons, who had been provided for in other clauses of the will. If the mention of the children was merely to show the motive for the gift to the wife, as must be held if the children are excluded, there was no necessity for providing that the two elder sons should take nothing under that clause, because in that view none of the children would take anything.

The interest or estate which would pass by the first sentence of the clause, if it stood alone, is changed or modified in two particulars by the residue of the clause: First, that the income only of the devised property can be used during the life of the wife, and, second, that the wife shall have power to dispose of the whole corpus by will.

It is contended on the one side, and the circuit court held, that the wife alone was entitled to the income of the property during her life. The language limiting the right to the use of the property during that time is as follows: "The income only of the amount thus devised shall be at the disposal during her life."

There is nothing in the language quoted which gives the wife the exclusive right to the income; neither is such right to be gathered from the context. The word "the" before the word "disposal" may be construed to mean "their" with as much, if not more, reason as to mean "her." The most that can be said is that the language of that sentence is ambiguous.

The general rule is that when words of a will, in the first instance, distinctly indicate an intention to make an absolute gift,

such gift is not to be lessened or cut down by subsequent provisions which are not equally as clear and decisive as the terms by which it was created, and that, where there are two apparently inconsistent and repugnant provisions in a will, the court will, as far as possible, reconcile them, and in so doing will endeavor not to disturb the first provision further than is absolutely necessary to give effect to the second. Gaskins *v.* Hunton, 92 Va. 528 23 S. E. 885, and cases cited; Hooe *v.* Hooe, 13 Grat. 245, 251, 252, and cases cited.

Applying these principles of construction to the clause under consideration, we are of opinion that the wife and the executor's children other than the two elder sons are jointly entitled to the income of the property devised during her life, and, in the event the wife does not dispose of the corpus by will, then it will pass to the said children and the heirs of the wife jointly.

We are of opinion, therefore, that the circuit court erred in the construction it placed upon the will.

Amongst the property passing under that provision was an interest in a tract of land known as "Morven," which contained something over 1,000 acres. Some time after the death of Dr. Cabell, Edward B. Smith, his executor, died, owning the remainder of that tract, which passed according to the law of descents to his wife and children. By a subsequent family arrangement that interest was conveyed to his executors, to be held by them in the same manner and upon the same terms as the property which passed by the fourteenth clause of Dr. Cabell's will, of which they were also the trustees. The complainant, Judge White, as substituted trustee, instituted this suit, under the provisions of section 2616 of the Code of 1904, to have confirmed a sale of that tract of land which he had made upon the condition that it met with the approval of the circuit court of Albemarle county. The widow of E. B. Smith, deceased, her living children, the child of a deceased child, and the heirs of Dr. Cabell, among others, were made parties to the bill.

There was a demurrer in writing to the bill, in which two grounds were stated—one because the bill did not state all the estate real and personal held in trust. The bill was amended in this respect. The other ground of demurrer was that the statute (section 2616 of the Code of 1904) under which, the trustee was proceeding did not authorize a conditional sale of the trust property and subsequent approval and confirmation by the court, but required that the trustee should first apply to the court for authority to sell.

The statute has been generally construed by the circuit courts as authorizing the court which has jurisdiction to order a sale to approve and confirm a sale made by the fiduciary before suit is brought subject to the court's approval and confirmation, pro-

vided "it be clearly shown, independently of any admissions in the answers, that the interests of the infant, insane person or beneficiaries in the trust, as the case may be, will be promoted, and the court is of opinion that the right of no person will be violated thereby, * * * " as required by section 2620 of the Code of 1904. This practice has, we think, been beneficial to those in whose interest and for whose protection the statute was enacted, and is justified by the decisions of this court, and the decided disposition it has shown to adopt the liberal rather than the strict rule of construction in interpreting the scope of a statute which it has held to be remedial in its nature. Faulkner *v.* Davis, 18 Grat. 651, 669, 98 Am. Dec. 698.

In 1823, in the case of Garland *v.* Loving, 1 Rand. 396, where a sale of lands in which infants were interested has been made conditionally, a suit was instituted to have the contract ratified and the proceeds applied under the direction of a court of chancery to the objects of the trust, if it could be done, this court said: "The court is further of opinion that, unless the chancellor [who had dismissed the bill] shall be satisfied [when the case goes back] that it is necessary to appoint another guardian ad litem, or to take other steps to satisfy himself that the interests of the infants manifestly require a sale of the estate, as aforesaid, or should ultimately be so satisfied, it will be competent for him, instead of directing a sale by his decree aforesaid, to confirm that already made to Nathan Loftus, under the terms and conditions aforesaid provided he is willing to abide thereby, and James Lowry and Nancy his wife are also willing to unite in the conveyance and to invest and secure the proceeds as aforesaid in the same manner as if such sale had originally been made in pursuance of a decree of the court."

In Palmer *v.* Garland's Committee, 81 Va. 444, where the committee of a lunatic filed his bill under the statute to have the court's approval and confirmation of certain offers to purchase the lunatic's land, it was held that the court had authority under the statute in question to approve and confirm the proposed sales, where it appeared that the interests of the lunatic would be promoted and the rights of no one would be violated by such sales.

Whilst in a proceeding under the statute a conditional sale made before suit brought may be approved and confirmed by the court, as well as a sale directed, in either case, however, it must be clearly shown as a condition precedent to such confirmation or order of sale, independently of any admissions in the answers, that the interests of the infants, insane persons, or beneficiaries in the trust, as the case may be, will be promoted thereby.

The complaint proved that he had made the conditional sale at the request, or with the consent, of several of the beneficiaries

under the trust, including the widow of E. B. Smith, deceased, and introduced documentary evidence and took the depositions of a number of witnesses and the affidavits of three persons to show that the conditional sale was for an adequate price, and would promote the interests of the beneficiaries. On the other hand, Mrs. Smith filed an answer in which, while admitting that the conditional sale had been made with her consent and approval, she alleged that it was a mistake, and opposed its confirmation. Other beneficiaries filed answers, also, in which they opposed the confirmation of the sale. They also took depositions of an equal or greater number of witnesses to show that the consideration at which the sale was made was less than its real value, and that the interests of the beneficiaries would not be promoted by its confirmation. The testimony is very conflicting, and the record, excluding the affidavits filed by the complainant which were objected to, does not clearly show that the price was adequate or that the interests of the beneficiaries would be promoted by the sale. The affidavits were ex parte, taken without notice, and filed on the day the case was submitted to the court for decision.

While affidavits are admissible upon the question of the confirmation of an ordinary sale made under a decree of court and reported to it for confirmation (Robertson *v.* Smith, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723), they are admitted largely upon the ground that courts in such cases must be able to act in a summary manner, and to avoid the delay which would result if depositions had to be taken (Savery *v.* Sypher, 6 Wall. [U. S.] 157, 159, 160, 18 L. Ed. 822). But the reason for that practice has no application to a case in which the court has never considered or determined the propriety of a sale under section 2616 of the Code of 1904.

As a general rule, in the absence of a statute authorizing it, affidavits are not admissible to establish the facts necessary to enable a court to enter a judgment or decree upon the merits of any case; and especially is this so in proceedings under section 2616 of the Code of 1904, which involve the rights and interests of persons laboring as a rule under some disability.

We are of opinion, therefore, that the circuit court erred in approving and confirming the conditional sale made by the complainant trustee, since it did not clearly appear that the interests of the beneficiaries under the trust would be promoted thereby.

The decree appealed from will be reversed, and this court will enter such decree in the cause as the circuit court ought to have entered, construing the fourteenth clause of Dr. Cabell's will, and will remand the cause to the circuit court, in order that the parties may take further evidence, if they be so advised, as to

the propriety of confirming the sale or of selling the lands in the bill and proceedings mentioned.

Reversed.

KEITH, P., and CARDWELL, J., absent.

Note.

This case is commented on editorially in February number of "The Law Register," p. 814.

MERRYMAN *et al. v.* HOOVER.

Nov. 21, 1907.

[59 S. E. 483.]

1. **Ejectment—Outstanding Title—Invalidity—Evidence.**—Code Va. 1904, § 2725, provides that no person shall bring ejectment unless he has a subsisting interest in the premises claimed and right to recover the same or the possession thereof, or some share, interest, or portion thereof. Held, that where there was an outstanding title in another when plaintiff brought ejectment, which continued for 10 years after the suit was begun, and until a few months before the trial, evidence was inadmissible to show that after such period such outstanding title had been adjudged ineffective as against plaintiff, under the rule that plaintiff in ejectment must recover on the strength of his own title as it existed when the suit was commenced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 28.]

2. **Same—Subsisting Interest.**—Where P. and wife, under whom plaintiff claimed part of the lands in controversy, had executed a deed purporting to convey the fee to a corporation, which deed was duly recorded, it disrupted plaintiff's paper title, and, being outstanding and uncanceled at the time plaintiff sued in ejectment, constituted a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 16-21.]

3. **Tenancy in Common—Adverse Possession.**—In ejectment, a charge, requested by plaintiff, that if the adverse possession claimed by defendant was interrupted at any time from the death of C., and if C.'s heirs had been under disabilities since that date, then there could have been no new adverse possession as against them, and therefore "no adverse possession as against the other parties in interest, their co-tenants," was properly modified by striking the clause quoted; the rule being that each tenant in common is entitled to sue according to his own capacity, regardless of disabilities of others.

4. **Writ of Error—Refusal of Instructions—Prejudice.**—Where the